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VIJAYARAO SEPERMANIAM v. SURUHANJAYA PERKHIDMATAN AWAM, MALAYSIA

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP CJ (MALAYA)
HASAN LAH FCJ
B RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 01-37-08-2017(P)]
16 AUGUST 2018

C

ADMINISTRATIVE LAW: *Public servants – Dismissal from service – Disciplinary proceedings against public servant – Public servant requested for relevant documents and sought to be accorded oral hearing to make representations on charges – Disciplinary authority did not entertain public servant's requests –* D *Public servant dismissed from service – Whether public servant denied right to be heard and right to documents – Whether dismissal from public service lawful, constitutional, valid and operative – Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), (i), 25(1), 28, 37(2)(a), 38*

ADMINISTRATIVE LAW: *Dismissal – Public servants – Right to appeal –* E *Disciplinary proceedings against public servant – Public servant requested for relevant documents and sought to be accorded oral hearing to make representations on charges – Disciplinary authority did not entertain public servant's requests – Public servant dismissed from service – Whether public servant had constitutional right to appeal to Appeal Board against decision of Public Service Commission –* F *Federal Constitution, art. 144(5A) and (5B) – Public Services Disciplinary Board Regulations 1993, regs. 5(1), 14*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to be heard – Disciplinary proceedings against public servant – Public servant requested for relevant documents and sought to be accorded oral hearing to make representations* G *on charges – Disciplinary authority did not entertain public servant's requests – Public servant dismissed from service – Whether public servant denied right to be heard and right to documents – Whether dismissal from public service lawful, constitutional, valid and operative – Federal Constitution, art. 132(1)(c)*

H The appellant, an officer of the Malaysian Anti-Corruption Commission ('the MACC'), was informed by the secretary of the respondent, the Public Service Commission of Malaysia ('the PSC') that disciplinary proceedings under reg. 37 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the POCDR'), were instituted against him, following five charges relating to issues of (i) irresponsibility and insubordination under reg. 4(2)(g) I and (i) of the POCDR; and (ii) a conduct that would bring the public service

into disrepute under reg. 4(2)(d) of the POCDR. The appellant was required to show cause and to make representation as to why disciplinary proceedings should not be taken against him. In his show cause letter, the appellant denied all the five charges and requested (i) for relevant documents that formed the subject matter of the charges against him to be supplied to him; and (ii) to be accorded an oral hearing to enable him to make the representations on each charge. However, the requests were not entertained and there was no reply from the PSC. The appellant was later notified by the PSC that, after considering all documents and his representations, he was found guilty on all the charges and dismissed from service. This prompted the appellant to initiate an application for judicial review at the High Court, (i) for an order of *certiorari* to quash the decision of the PSC; and (ii) to declare that his dismissal from the public service was unlawful, unconstitutional, void and inoperative and that an account be taken of the salary and emoluments due to him from the date of such wrongful dismissal. In support of his application, the appellant argued that he was denied the right to an oral hearing under art. 135(2) of the Federal Constitution ('the FC'), rights to documents and right to appeal to the Appeal Board. The High Court Judge dismissed the appellant's application on the ground that there was no merit in the application. The appellant's appeal to the Court of Appeal proved futile. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the appellant had the constitutional right to appeal to the Appeal Board against the decision of the PSC under art. 144(5B) of the FC; and (ii) whether, in view of art. 132(1)(c) of the FC, the appellant ought not to be dismissed from public service without being given a reasonable opportunity of being heard, which includes the right of appeal as provided by art. 144(5B)(ii) of the FC and reg. 14 of the Public Services Disciplinary Board Regulations 1993 ('the PSDBR').

Held (allowing appeal with costs)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) The disciplinary proceedings against the appellant, which resulted in his dismissal from public service, was initiated and conducted by the PSC in its capacity as a Disciplinary Board ('the DB') by virtue of reg. 5(1) of the PSDBR. It had the necessary jurisdiction to do so and there was nothing improper in law. The PSC is the only body or authority empowered to deal with matters involving disciplinary proceedings against an officer in the managerial and professional group with a view to dismissal or reduction in rank. There is no avenue for appeal provided for in the PSDBR. If the appellant is aggrieved with the decision of the PSC in dismissing him, he has the liberty to apply for judicial review at the High Court, as what had been done in the present case. The reliance by the appellant solely on art. 144 (5B)(ii) of the FC was not correct. It was based on a misconstrued interpretation of that

provision. The appellant was never denied the right to appeal as the powers and functions provided for under art. 144(5A) and (5B) of the FC read together with the provisions of and Schedule to the PSDBR did not provide for such powers, to receive, hear, consider and decide on any appeal. Therefore, the appellant had no constitutional right to appeal to the Appeal Board against the decision of the PSC under art. 144(5B)(ii) of the FC. (paras 32 & 42)

(2) Based on authorities, the law, as currently adopted by the courts, is more inclined in favour of affording a right to be heard orally to an officer facing disciplinary proceedings if there is a request made by him to the disciplinary authority. The appellant had also complained that he was not given any document at all by the PSC notwithstanding that specific request was made for those relevant documents including the reports that were relied upon by the PSC in finding that a *prima facie* case had been proved against him. The right to documents related to the disciplinary proceedings is closely linked to the right to an oral hearing. Both are important elements in fulfilling the right to be heard to be afforded to the officer concerned. In view of the serious charges levelled against the appellant, which ultimately resulted in him being dismissed from the service, the appellant ought to have been supplied with all the relevant documents and reports requested by him particularly since the disciplinary authority had relied on those documents to decide that a *prima facie* case had been proved against the appellant, to enable him to make an effective and meaningful defence to the charges. (paras 79, 81 & 82)

(3) The orders of the courts below were set aside. It was ordered that (i) the order of dismissal of the appellant made by the PSC was set aside as it was null and void and of no effect in law; (ii) the appellant be reinstated as an Investigating Officer Grade P44 at the MACC; and (iii) the Registrar of the High Court to conduct an assessment enquiry to ascertain salary, emolument, allowances and other benefits accrued and due to the appellant which should be received from the date of dismissal until full settlement. (para 92)

Bahasa Malaysia *Headnotes*

Perayu, seorang pegawai Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'), dimaklumkan oleh setiausaha responden, Suruhanjaya Perkhidmatan Awam Malaysia ('SPAM'), bahawa prosiding tatatertib bawah peraturan 37 Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('PPAKT'), akan dikenakan terhadapnya berikutan lima pertuduhan berkaitan isu-isu (i) tidak bertanggungjawab dan keingkaran bawah peraturan 4(2)(g) dan (i) PPAKT; dan (ii) satu kelakuan yang memburukkan nama perkhidmatan awam bawah peraturan 4(2)(d) PPAKT. Perayu diminta tunjuk

sebab dan memberi pernyataan tentang kenapa dia tidak patut dikenakan prosiding tatatertib. Dalam surat tunjuk sebabnya, perayu menafikan kelima-lima pertuduhan dan memohon agar (i) dokumen-dokumen relevan yang membentuk hal perkara pertuduhan terhadapnya dikemukakan kepadanya; dan (ii) diberi perbicaraan lisan untuk membolehkan dia membuat pernyataan menjawab setiap pertuduhan. Walau bagaimanapun, kedua-dua permohonan ini tidak diendahkan dan tidak dibalas oleh SPAM. Perayu seterusnya dimaklumkan oleh SPAM bahawa, selepas mempertimbangkan kesemua dokumen dan pernyataannya, perayu didapati bersalah atas kesemua pertuduhan dan ditamatkan daripada perkhidmatan. Ini mendorong perayu memulakan satu permohonan semakan kehakiman di Mahkamah Tinggi untuk (i) satu perintah *certiorari* membatalkan keputusan SPAM; dan (ii) mengisytiharkan penamatan perkhidmatan awamnya tidak sah, tidak berperlembagaan, terbatal dan tidak berkuat kuasa dan agar satu akaun dibuat untuk gaji dan emolumen yang terhutang padanya dari tarikh penamatan salah tersebut. Menyokong permohonannya, perayu menegaskan dia dinafikan hak mendapat perbicaraan lisan bawah per. 135(2) Perlembagaan Persekutuan ('PP'), hak mendapat dokumen-dokumen dan hak merayu pada Lembaga Rayuan. Hakim Mahkamah Tinggi menolak permohonan perayu atas alasan permohonannya tidak bermerit. Rayuan perayu di Mahkamah Rayuan tidak berjaya. Maka timbul rayuan ini. Isu-isu yang timbul untuk dipertimbangkan oleh mahkamah adalah (i) sama ada perayu mempunyai hak berperlembagaan untuk merayu pada Lembaga Rayuan, terhadap keputusan SPAM, bawah per. 144(5B) PP; dan (ii) sama ada, berdasarkan per. 132(1)(c) PP, perayu tidak sepatutnya ditamatkan perkhidmatan awamnya tanpa diberi peluang munasabah untuk didengar, termasuk hak merayu seperti yang diperuntukkan oleh per. 144(5B)(ii) PP dan peraturan 14 Peraturan Lembaga Tatatertib Perkhidmatan Awam 1993 ('PLTPA').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Prosiding tatatertib terhadap perayu, yang menyebabkan penamatan perkhidmatan awamnya, dimulakan dan dijalankan oleh SPAM dalam kapasitinya sebagai Lembaga Tatatertib ('LT') bawah peraturan 5(1) PLTPA. SPAM mempunyai bidang kuasa berbuat sedemikian dan tiada apa-apa yang tidak wajar bawah undang-undang. SPAM satu-satunya badan atau pihak berkuasa yang diberi kuasa menangani hal-hal melibatkan prosiding tatatertib terhadap pegawai dalam kumpulan pengurusan dan profesional dengan tujuan penamatan perkhidmatan atau penurunan pangkat. Tiada cara merayu yang diperuntukkan dalam PLTPA. Jika perayu terkilan dengan keputusan SPAM yang menamatkan perkhidmatannya, dia bebas memohon semakan

kehakiman di Mahkamah Tinggi, seperti yang telah dia lakukan dalam kes ini. Sandaran perayu pada per. 144(5B)(ii) PP, semata-mata, tidak tepat. Ini berdasarkan salah tafsiran peruntukan tersebut. Perayu tidak pernah dinafikan hak merayu kerana kuasa-kuasa dan fungsi-fungsi yang diperuntukkan bawah per. 144(5A) dan (5B) PP, dibaca bersama-sama dengan peruntukan dan Jadual PLTPA, tidak memperuntukkan kuasa sedemikian untuk membicarakan, mempertimbangkan dan memutuskan apa-apa rayuan. Oleh itu, perayu tiada hak berperlembagaan untuk merayu pada Lembaga Rayuan terhadap keputusan SPAM bawah per. 144(5B) PP.

(2) Berdasarkan nas, undang-undang, seperti yang diguna pakai oleh mahkamah, lebih cenderung memberi hak perbicaraan lisan kepada seorang pegawai yang berdepan dengan prosiding tatatertib jika terdapat permohonan olehnya kepada pihak berkuasa tatatertib. Perayu juga mengadu dia langsung tidak diberi apa-apa dokumen oleh SPAM walaupun permohonan khusus sudah dibuat agar dokumen-dokumen relevan, termasuk laporan yang menjadi sandaran SPAM dalam mendapati satu kes *prima facie* berjaya dibuktikan terhadapnya. Hak mendapat dokumen berkaitan prosiding tatatertib berkait rapat dengan hak mendapat perbicaraan lisan. Kedua-duanya elemen penting dalam memenuhi hak dibicarakan yang diberi kepada pegawai berkenaan. Berdasarkan pertuduhan-pertuduhan serius yang dilemparkan terhadap perayu, yang akhirnya menyebabkan penamatan perkhidmatannya, perayu sepatutnya diberi kesemua dokumen dan laporan relevan yang diminta olehnya, khususnya kerana pihak berkuasa tatatertib bergantung pada dokumen-dokumen ini untuk memutuskan satu kes *prima facie* telah dibuktikan terhadap perayu, untuk membolehkan dia membuat pembelaan berkesan dan bermakna terhadap pertuduhan-pertuduhan ini.

(3) Perintah mahkamah bawahan diketepikan. Diperintahkan agar (i) perintah penamatan perkhidmatan perayu yang dibuat oleh SPAM diketepikan kerana tidak sah dan terbatal dan tiada kesan undang-undang; (ii) perayu dikembalikan ke jawatannnya sebagai Pegawai Penyiasat Gred P44 di SPRM; dan (iii) Pendaftar Mahkamah Tinggi menjalankan inkuiri taksiran untuk mengenal pasti gaji, emolumen, elaun dan lain-lain faedah terakru dan terhutang pada perayu yang sepatutnya diterima dari tarikh penamatan perkhidmatan hingga penyelesaian penuh.

Case(s) referred to:

Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 1 CLJ 493 CA ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Chai Kok Choi v. Ketua Polis Negara & Ors [2008] 1 CLJ 113 FC ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***
Gnanasekaran Krishnasamy v. Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [2012] 2 CLJ 985 FC ***(refd)***
Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***
Mat Ghaffar Baba v. Ketua Polis Negara & Anor [2008] 1 CLJ 773 CA ***(refd)***
Mohd Zulhazi Mohd Zulkafli v. Suruhanjaya Pasukan Polis DiRaja Malaysia & Anor [2014] 1 LNS 574 CA ***(refd)***
Najar Singh v. Government of Malaysia & Anor [1974] 1 LNS 101 FC ***(refd)***
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***
Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***
R v. Immigration Appeal Tribunal [1977] 1 WLR 795 ***(refd)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***
Zainal Hashim v. Government of Malaysia [1979] 1 LNS 132 PC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 132(1)(c), 135(2), 144(5B)(ii)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, GO 26(5)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), (i), 25(1), 28, 37(2)(a), 38
Public Services Disciplinary Board Regulations 1993, regs. 2(1), 3(1), 5(1), 12(1), 14

For the appellant - MM Athimulan; M/s Athimulan & Co
For the respondent (PSC) - Shamsul Bolhassan & Maisarah Juhari SFCs; AG Chambers

[Editor's note: For the Court of Appeal judgment, please see Vijayarao Sepermaniam v. Suruhanjaya Perkhidmatan Awam, Malaysia [2017] 4 CLJ 451 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ramly Ali FCJ:

Introduction

[1] This is an appeal by the appellant, Vijayarao a/l Sepermaniam, against the decision of the Court of Appeal dismissing his appeal and affirming the decision of the High Court whereby his application for judicial review against the decision of the respondent was dismissed. For the purpose of this judgment, the respondent will be referred to as the PSC.

[2] In his judicial review application, the appellant was seeking, *inter alia*, an order of *certiorari* to quash the decision of the PSC in dismissing him from his service at the Malaysia Anti-Corruption Commission (MACC) and for a declaration that his dismissal from the public service was unlawful, unconstitutional and void.

[3] The High Court dismissed his application with costs. The appellant then appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal.

[4] Leave to appeal to this court was granted on 19 June 2017 on the following questions:

(i) whether the appellant had the constitutional right to appeal to the Appeal Board against the decision of the PSC under art. 144(5B)(ii) of the Federal Constitution?; (question 1) and

(ii) whether in view of art. 132(1)(c) of the Federal Constitution, the appellant ought not to be dismissed from public service without being given a reasonable opportunity of being heard which includes the right of appeal as provided by art. 144(5B)(ii) of the Federal Constitution and reg. 14 of the Public Services Disciplinary Board Regulation 1993. (question 2)

Background Facts

[5] The appellant was an investigating officer (Grade P44) of the MACC. On 6 August 2012, the secretary of the PSC wrote to the appellant informing him that the PSC had received a report to the effect that the appellant had committed disciplinary offences. The appellant was also informed of the PSC's decision to institute disciplinary proceedings against him under reg. 37 of the Public Officers (Conduct and Discipline) Regulations 1993 (PU(A) 395) (the POCD Regulations).

[6] In the same letter, the PSC framed five charges against the appellant and consequently the appellant was requested to show cause and to make representation as to why disciplinary proceedings should not be taken against him and why he should not be dismissed or reduced in rank. Briefly, the essence of the five charges related to issues of irresponsibility and insubordination under reg. 4(2)(g) and (i) of the POCD Regulations; and a conduct that would bring the public service into disrepute under reg. 4(2)(d) of the same Regulations.

[7] The appellant was given 21 days from the date of the said letter to make representation in writing to the PSC stating the grounds on which he wished to rely to exculpate himself on the charges against him ("yang mengandungi alasan-alasan yang tuan hendak gunakan untuk membebaskan diri tuan").

[8] The appellant, on 3 September 2012, replied to the show-cause letter. In his 28 pages letter, the appellant categorically denied all the five charges against him. In defending himself, he gave an elaborate representation on each charge. The appellant requested for relevant documents that formed the subject matter of the charges against him to be supplied to him. The appellant also requested that he be accorded an oral hearing to enable him to make appropriate representations on each charge. However, the requests were not entertained by the PSC. In fact, there was no reply at all from the PSC to those requests.

[9] On 12 February 2014, the appellant was notified by the PSC that after considering all documents and the representations made by him, he was found guilty on all the charges and consequently he was dismissed from service with effect from 27 January 2014. It was also stated in the said letter that the decision of the PSC was final.

[10] The appellant then filed the present application for judicial review at the High Court in Penang, for an order of *certiorari* to quash the decision of the PSC and to declare that his dismissal from the public service was unlawful, unconstitutional, void and inoperative and that an account be taken of the salary and emoluments due to him from the date of such wrongful dismissal.

[11] The learned judge dismissed the appellant's application on the ground that there was no merit in the application. On appeal, the Court of Appeal dismissed the appeal. Hence, the present appeal before us.

At The High Court

[12] At the High Court, the appellant contended that he was denied of his right to an oral hearing under art. 135(2) of the Federal Constitution, right to documents, and right to appeal to the Appeal Board.

[13] On the issue of the right to be heard accorded by art. 135(2) of the Federal Constitution, the learned judge ruled *inter alia*:

> In so far as the right to be heard accorded by Article 135(2) of the Federal Constitution is concerned, it does not mean that the applicant must be heard orally. Whether a person is to be given oral hearing or not depends on the facts of each case. But generally, the absence of an oral hearing does not amount to a denial of natural justice; see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525. In the instant case, I find the applicant was given the right to be heard when he had given his written representation. His lengthy explanation shows he understood the charges. The respondent was satisfied with his written representation. They don't

require clarification by way of oral hearing. As such, the applicant's contention that he must be given oral hearing is without merit and must fail.

[14] On the issue of right to documents, the learned judge ruled, *inter alia*:

> With regard to the appellant's contention that he ought to be given documents and records for him to prepare a defence, this court finds such contention is baseless. The facts show, without the said documents, the applicant was able to give a lengthy written representation to exculpate himself. Hence, he does not require any additional facts or document to put up his defence or representation.

The learned judge concluded that "on the facts and circumstances of the case, the applicant is not entitled to be given the reports and documents he had asked for."

[15] On the right to appeal to the Appeal Board, the learned judge ruled, *inter alia*:

> Finally, the applicant's contention that he was denied the right to appeal is rebutted by the letter dated 12.2.2014 issued by the respondent which states the decision of the respondent is final. The word "final" meant the decision could not be challenged or appealable by the applicant.

[16] The learned judge concluded her judgment in the following words:

> The respondent as the disciplinary tribunal has the power to make such an order, if after taking into account the nature of the offence committed and the applicant's representation, the respondent comes to a conclusion that the appropriate punishment to be imposed on the applicant is dismissal. That decision must be given its effect. It is not for this court to interfere, especially when the affidavit evidence show the disciplinary action was carried out in compliance with its procedural rules. For the aforesaid grounds, I dismiss the application with cost.

At The Court Of Appeal

[17] Aggrieved with the decision of the High Court, the appellant appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal. On the issue of right to an oral hearing, the Court of Appeal had considered the following decisions of this Court, namely: *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525; *Public Service Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; and *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773.

[18] The Court of Appeal summarised the key principles on the issue of right to an oral hearing as follows: A

> In our view, the key principles distilled from the aforesaid decisions of the apex court may be briefly stated as follows:
>
> (a) The right to be heard does not mean the right to be heard orally. What it means is that the public officer concerned should be given a full opportunity of stating his case. B
>
> (b) An oral hearing may be given in instances where the disciplinary authority considers that the case against the public officer requires further clarification.
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> (c) Where there is a request by the public officer for an oral hearing after he has denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, the officer should be afforded an oral hearing. C
>
> (d) An oral hearing should be granted when there is a request and when the disciplinary authority is faced with two sets of facts, documents and evidence. D
>
> (e) All the circumstances of each case must be fully considered before the court could come to the conclusion whether or not the right to an oral hearing has been properly observed by the disciplinary authority. E

[19] Applying the above principles, the Court of Appeal made the following conclusion:

> It is patently clear from the above that what the appellant tried to do was to explain and justify his action and omissions. He proffered his own interpretation and understanding of the regulations and directives in question. The appellant has not disputed the facts which form the subject matter of the charges. As such, this case does not involve two sets of facts and documents. We have carefully scrutinised the appeal records and are constrained to hold that the appellant has not exculpated himself by furnishing credible evidence in his representation letter. In all the circumstances, we are bound to hold that the appellant knew the charges which were made against him, the evidence which has been given and the statements affecting him. He had been given a fair opportunity to correct or contradict them. In short, the appellant had been given the full opportunity of stating his case. F G H
>
> In its concluding remarks, the Court of Appeal reiterated that: "Having carefully considered the circumstances surrounding this case, we are of the view that the right to an oral hearing was properly observed by the PSC". I

[20] On the issue of right to documents, the Court of Appeal having considered the following authorities, namely: *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] 28 MLJ 169 (PC); and *Mohd Zulhazi Mohd Zulkafli v. Suruhanjaya Pasukan Polis DiRaja Malaysia & Anor* [2014] 1 LNS 574; [2015] 2 MLJ 88 (CA); summarised the general principles as follows:

(i) concomitant with the right to be heard is the right of a person to know the case made against him;

(ii) he must know what evidence has been given and what statements have been made affecting him; and

(iii) he must be given a fair opportunity to correct or contradict them.

[21] In the upshot the Court of Appeal made the following conclusion on this issue:

> The appellant was charged for being irresponsible and insubordinate under reg. 4(2)(g) & (i) of the POCD Regulations under the first, third, fourth and fifth charges and for conducting himself in such a manner as to bring the public service into disrepute under reg. 4(2)(d) under the second charge. We have perused the five charges in question and we agree that the subject matter of the charges relate to (i) Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No. 1/2010, Arahan Pengarah Bahagian Operasi Khas dated 14.1.2011 and newspaper reports in the Berita Harian and Utusan Malaysia dated 21.9.2011 and 8.10.2011. The newspapers articles in question are known to the appellant as the relevant extracts therefrom are reproduced in the second charge. The appellant's claim of ignorance of the Arahan Pengarah Bahagian Operasi Khas dated 14.1.2011 is of no avail because as an officer of the MACC he is deemed to know the rules and regulations which govern him (*Abdul Aziz Bin Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor (supra).* The other documents relate to the then on-going police investigations against the appellant and are confidential papers which are not accessible to the appellant. We have also perused the appellant's representation letter; we note that he has given detailed and comprehensive answers and explanations for all the five charges. As such, we do not agree that he was not given a fair opportunity to correct or contradict them.

[22] On the right to appeal to the Appeal Board, the Court of Appeal found that "the disciplinary action to which the appellant was subjected to with a view to dismissal or reduction in rank is not one which is appealable under the Disciplinary Board (DB) Regulations". The Court of Appeal ruled:

> In the first place, it must be noted that the DB is a body established under sub-reg. 2(1) of the DB Regulations. Sub-regulation 3(1) thereof stipulates that the jurisdiction of the DB relates to the conduct and discipline of officers under the Managerial and Professional Group. Sub-regulation

3(3) further provides that the DB shall have jurisdiction as specified in column 3 of the Schedule. Column 3 of the Schedule refers to "Disciplinary action not with a view to dismissal or reductions in rank.

In other words, the jurisdiction of the DB in respect of staff falling under the Managerial and Professional Group is limited to disciplinary action not with a view to dismissal or reduction in rank. It follows that if the disciplinary action is one with a view to dismissal or reduction in rank, as in the present case, then the DB is not seized with the jurisdiction. Consequently, the appellant is not eligible to lodge an appeal against the decision of the PSC to the DB. The appellant's argument that he has been denied his right of appeal is misconceived in law and in fact and is without merit. There was no misdirection by the learned judge in this regard.

At The Federal Court

[23] We shall now deal with question 1.

[24] Question 1 relates to the issue of whether the appellant has the right to appeal to the Appeal Board against the decision of the PSC under art. 144(5B)(ii) of the Federal Constitution.

Submission By Senior Federal Counsel (SFC)

[25] Learned SFC, acting for and on behalf of the PSC, submitted that the relevant regulations for disciplinary appeals to the Disciplinary Appeal Board ie, the Public Services Disciplinary Board Regulations 1993 (PSD Regulations) and the POCD Regulations did not provide for an avenue for the appellant to appeal to the Appeal Disciplinary Board as the disciplinary proceeding taken against him was not within the purview of reg. 2(1) of PSDB Regulations. This is because at the time the disciplinary proceeding was taken against him, he was an officer in the Managerial and Professional Group and the disciplinary proceeding was with a view to dismissal or reduction in rank.

[26] It was further submitted that the right to appeal to the Disciplinary Appeal Board cannot be afforded to the appellant as the PSC had no right, obligation or duty under the PSDB Regulations to receive, hear, consider and decide on any appeal which arose from the decision of the PSC itself. The relevant regulations provided the enabling power and jurisdiction for the PSC itself to dismiss officers in the Managerial and Professional Group in a disciplinary action for misconduct with a view to dismissal or reduction in rank.

[27] Learned SFC contended that the appellant was never denied the right to appeal by the PSC, because there was no such avenue available after the PSC had made a decision to dismiss him from the public service. To the learned SFC, the only avenue left for the appellant, if he was aggrieved with the decision of the PSC, was for him to make an application to the High

Court for judicial review. Therefore, the appellant's allegation that he was denied his constitutional right to appeal to the Appeal Board was frivolous and that the decision made by the PSC in this matter was in fact final based upon the existing relevant provisions of the law and regulations.

Submission By Appellant's Counsel

[28] Learned counsel submitted that proceedings with regard to dismissal or reduction in rank involving a member of the general public service (as listed in art. 132(1)(c) of the Federal Constitution) must be carried out by a board appointed by the Yang di-Pertuan Agong under art. 144(5B)(i) of the Federal Constitution, but not by the PSC. In the present case, the appellant was dismissed by the PSC. Therefore, the PSC had not acted properly and within its jurisdiction. The constitutional power on matters of conduct and discipline did not rest in the PSC anymore. The act of the PSC was *ultra vires* the constitutional provisions, and therefore the validity and effect of the dismissal itself is open to question. The disciplinary authority was the Public Services Disciplinary Board and therefore by virtue of art. 144 (5B)(ii) of the Federal Constitution, the PSC was precluded from acting as it purported to do in the present case against the appellant.

[29] Learned counsel further submitted that the appellant was denied the right of appeal to the Public Services Disciplinary Board; and this contravenes the provisions of art. 144(5B)(ii) of the Federal Constitution which reads:

> Any person aggrieved by the exercise of the board of any aforesaid powers or functions may appeal to an Appeal Board appointed by the Yang Di Pertuan Agong.

[30] Learned counsel contended that the appellant had the constitutional right to appeal to an Appeal Board against the decision of the PSC under art. 144(5B) of the Federal Constitution, which appeal procedure was contained in regs. 3(1) and 14 of the Public Services Disciplinary Board Regulations 1993.

[31] On that ground, learned counsel submitted that the denial of the constitutional right to appeal to the Appeal Board, invalidated the dismissal action by the PSC on the appellant. Therefore, the Court of Appeal was wrong in law when it ruled that the appellant was not eligible to lodge an appeal against the decision of the PSC to the Appeal Board.

Our Decision On Question 1

[32] Article 144(5B)(ii) of the Federal Constitution relates to the right to appeal to an Appeal Board by a person who is aggrieved by the exercise of powers or functions by the Board appointed by the Yang di-Pertuan Agong under cl. (5B)(i) of the same article.

[33] Clause (5B)(i) reads:

> Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first appointment to the permanent or pensionable establishment, may be exercised by a board appointed by the Yang di-Pertuan Agong.

[34] Clause (5B)(ii) reads:

> (ii) Any person aggrieved by the exercise by the board of any of the aforesaid powers or functions may appeal to an Appeal Board appointed by the Yang di-Pertuan Agong.

[35] In the exercise of the powers conferred by cl. (5B)(i) above, the Yang di-Pertuan Agong made the PSDB Regulations which came into force on 15 December 1993. The Public Services Disciplinary Board was established under reg. 2(1) of the PSDB Regulations. Under reg. 3(1) of the same regulations, the Disciplinary Board has jurisdiction in matters relating to the conduct and discipline of all persons specified in Column 2 of the Schedule who are members of the services mentioned in paras. (c) and (f) of art. 132(1) of the Federal Constitution.

[36] Paragraph (c) of art. 132(1) refers to the general public service of the Federation. The appellant in the present appeal was in this category.

[37] The jurisdictions of the Disciplinary Board are found in Column 3 of the Schedule to the PSDB Regulations. In Column 3, except for the Disciplinary Board for the Support Group (No. 1) which provides for disciplinary action with a view to dismissal or reduction in rank, the jurisdiction over all other categories of officers only relates to disciplinary action not with a view to dismissal or reduction in rank.

[38] Thus, the power to dismiss or reduce in rank an officer in the Top Management Group and the Managerial and Professional Group can only be exercised by the PSC, the respondent in the present appeal. This is clearly provided for in reg. 5(1) of the PSDB Regulations. The Disciplinary Board established under reg. 2(1) has no such power or jurisdiction to deal with such proceedings.

[39] The Public Services Disciplinary Appeal Board (the Disciplinary Appeal Board) was established under reg. 12(1) of the PSDB Regulations. Regulation 13 provides for the functions of the Disciplinary Board. It reads:

> 13. The functions of the Disciplinary Appeal Board shall be to receive, consider and decide on any appeal made in accordance with the provisions of these Regulations with respect to any decision of the Disciplinary Board relating to the conduct and discipline of an officer in any of the services referred to in regulation 3.

[40] Under reg. 14 of the PSDB Regulations, an officer aggrieved by the decision of the Disciplinary Board established under reg. 2(i) may appeal against such decision to the Disciplinary Appeal Board established under reg. 12 of the PSDB Regulations.

[41] Learned counsel for the appellant argued that the appellant's right to an appeal is provided for by art. 144(5B)(ii) of the Federal Constitution; and therefore the appellant has the right to appeal against the decision of the PSC to an Appeal Board appointed by the Yang di-Pertuan Agong.

[42] The disciplinary proceeding against the appellant, which resulted in his dismissal from the public service, was initiated and conducted by the PSC in its capacity as a Disciplinary Board by virtue of its powers under reg. 5(1) of the PSDB Regulations. It has the necessary jurisdiction to do so. There is nothing improper in law. This is because the PSC is the only body or authority empowered to deal with matters involving disciplinary proceedings against an officer in the Managerial and Professional Group with a view to dismissal or reduction in rank. There is no avenue for appeal provided for in the PSDB Regulations. If the appellant is aggrieved with the decision of the PSC in dismissing him, he has the liberty to apply for judicial review at the High Court as what had been done in the present case.

[43] To conclude on this issue, we agree with the submission of learned SFC that the reliance by the appellant solely on art. 144(5B)(ii) of the Federal Constitution is not correct. It was based on a misconstrued interpretation of that provision. We are of the view that the appellant was never denied the right to appeal in the present case as the powers and functions provided for under art. 144(5A) and (5B) of the Federal Constitution read together with the provisions of and Schedule to the PSDB Regulations did not provide for such powers, to receive, hear, consider and decide on any appeal. Therefore we answer question 1 in the negative, ie, that on the facts of the present case, the appellant had no constitutional right to appeal to the Appeal Board against the decision of the PSC under art. 144(5B)(ii) of the Federal Constitution.

Question 2

[44] We shall now deal with question 2.

[45] In essence, question 2 relates to the right of the appellant to be given a reasonable opportunity of being heard in the disciplinary proceedings against him which resulted in him being dismissed from the public service by the PSC.

[46] On this issue, the appellant complained that the PSC had failed or refused to afford him an oral hearing despite a specific written request having been made by him after he had denied all the charges and had furnished

credible evidence in his representation letter to exculpate himself; and that such failure was against the constitutional requirement of art. 135(2) of the Federal Constitution and thus afforded a good ground to allow the appellant's appeal.

Submission By Appellant's Counsel

[47] Learned counsel contended that the appellant was not given a reasonable opportunity of being heard in the disciplinary proceeding against him. In this case, the appellant had never pleaded guilty to any of the charges against him. He had given explanation to the PSC for each and every charge and disputed the facts therein. The PSC had not contradicted or clarified anything on the appellant's statement in his written representations. The appellant had specifically requested for an oral hearing in his written representation to enable him to adduce further evidence. He also demanded documents and reports relied on by the disciplinary authority to be supplied to him to enable him to make representations in the oral hearing. The PSC did not even respond to the request and demand.

[48] Learned counsel further argued that the right of the appellant to an oral hearing to the appellant, was a right to the minimum standard of procedural fairness, and in carrying out the disciplinary procedure, natural justice demanded that the disciplinary authority must employ means that justify the end rather than using the end to justify the means.

[49] Learned counsel cited decisions of this court on this issue in *Yusof Sudin (supra)*, *Tay Chai Huat (supra)*, *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008] 1 CLJ 113; [2008] 1 MLJ 725 and *Vickneswary (supra)* to support his contention that when there was a request made by a public officer involved in a disciplinary proceedings for an oral hearing after he had denied all the charges and appeared to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of GO 26(5) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 (General Order 1980) the officer should be afforded such an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution.

[50] Learned counsel concluded his submission by stressing that there had been a clear breach of natural justice in the disciplinary proceedings. This contravened art. 135(2) of the Federal Constitution and that rendered the disciplinary proceedings, against the appellant, null and void, and consequently, the appellant ought not to be dismissed from his service.

Submission By SFC For The PSC

[51] On behalf of the PSC, learned SFC submitted that the procedure adopted by the disciplinary authority in the present case has complied strictly with the POCB Regulations and the PSDB Regulations. The appellant was issued with the show-cause letter notifying the nature of accusations and the

possible punishments under reg. 37(2)(a) read with reg. 38 of the POCD Regulations. He was invited to make a written representation within 21 days, which he did. It was only after the disciplinary authority was satisfied that the written representation did not exculpate him on the said charges that the disciplinary authority decided to dismiss him form the public service. The procedure in reg. 37 of the POCD Regulations was followed by the PSC.

[52] It was also submitted that the appellant was not denied of his constitutional right of being heard under art. 135(2) of the Federal Constitution as he had been given an opportunity to state his case in his written representation.

[53] Learned SFC argued that "the right to be heard" as enshrined in art. 135(2) of the Federal Constitution did not mean the right to be heard orally. What it means is that the officer concerned should be given full opportunity of stating his case. To support her contention, learned SFC relied on an earlier decision of this court in *Utra Badi (supra)*. In the present case, the appellant had been given a reasonable opportunity of being heard and had a full opportunity to state his case on all the charges proffered against him even without affording him an oral hearing. Therefore, the appellant's complaint on this issue has no basis at all and his appeal herein ought to be dismissed.

[54] Learned SFC also cited other authorities, namely: *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777; and *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 CLJ 333 to support her submissions.

Our Decision On Question 2

[55] The central point for consideration relating to question 2, revolves on the issue of "right to be heard". In the present appeal, the appellant was asked to make his representations in writing and to show cause as to why disciplinary action could not be taken against him with the view to dismissal or reduction in rank. He submitted his written representations within the time given by the PSC. His complaint was that he was not given the right or opportunity to be heard orally which he had requested for in his written representation. The PSC had not responded to his request until he was notified of his dismissal from his service.

[56] We shall now deal with the issue of the right to be heard in general first. In our view, the right to be heard is an important pillar of natural justice. It is a right to the minimum standard of procedural fairness. In carrying out the disciplinary procedure, natural justice requires that the disciplinary authority must afford the right to be heard to the officer directly

affected by it. It applies to every case where an individual is adversely affected in a proceeding involving an administrative action (see: *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152).

[57] The general rule of the right to be heard more popularly known by its Latin version of as '*audi alteram partem*' (hear the other side), requires that a disciplinary decision be the person directly affected by given a fair opportunity both to state his case and to know and answer the case of the other side; otherwise the disciplinary decision cannot stand. Any decision reached in contravention of this rule will be void for being *ultra vires* art. 135(2) of the Federal Constitution.

[58] Article 135(2) of the Federal Constitution provides: "No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard". The same right was replicated in reg. 25(1) of the POCD Regulations as follows: "Subject to the provisions of sub-reg. (2) no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this part unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard". Regulation 28 of the POCD Regulations sets out the procedure to be followed in disciplinary proceedings with a view of dismissal or reduction in rank.

[59] What amounts to a reasonable opportunity to be heard under art. 135(2) of the Federal Constitution must be determined by the nature of the matter in issue. Arifin Zakaria CJ in *Tay Chai Huat (supra)* had expressed his observation that "… if the right to be heard under art. 135(2) is to have any real meaning, the circumstances of each case must be fully considered before the court could come to the conclusion whether or not such right has been properly observed by the disciplinary authority."

[60] The importance of this rule was earlier expressed by Lord Denning in *B Surinder Singh Kanda (supra)* where His Lordship said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education v. Rice* (a) down to the decision of their Lordships' Board in *Ceylon University v. Fernando* (4). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

[61] The issue before us now is whether the words "opportunity of being heard" connotes an oral hearing.

[62] This court in *Utra Badi (supra)* had held that "the right to be heard given by art. 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give an appellant an oral hearing was a denial of justice … what is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed. (see also: *Najar Singh v. Government of Malaysia & Anor* [1974] 1 LNS 101; [1974] 1 MLJ 138; and *Zainal Hashim v. Government of Malaysia* [1979] 1 LNS 132; [1979] 2 MLJ 276).

[63] In the case of *Vickneswary (supra)*, this court had held to the effect that the disciplinary authority ought not to have granted the officer concerned an opportunity to be heard orally. It was also ruled in that case that in deciding whether to refer the matter to the committee of inquiry, the disciplinary authority would have to consider the written representation of the officer ie, whether his written representation exculpated himself from the charges preferred against him.

[64] In short, both decisions in *Utra Badi (supra)* and *Vickneswary (supra)* affirmed the rule that the right to be heard under art. 135(2) of the Federal Constitution did not require the officer concerned be given an oral hearing.

[65] However, this court in *Utra Badi (supra)* in deciding that the right to be heard under art. 135(2) of the Federal Constitution did not connote an oral hearing, did mention that "what is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed."

[66] Depending on the facts and circumstances of each case, a full opportunity of stating the officer's case before his dismissal may be by way of written representations only; or both written as well as oral representations; or oral representations only. Article 135(2) of the Federal Constitution does not expressly provide whether it should be by way of written representations only or oral hearing only or both.

[67] As stated earlier the right to be heard is a basic right giving a party an opportunity to give explanation against an accusation or evidence against him. Some of these may by their very nature be adequately dealt with by way of a written representation; some can only be effectively conveyed by way of an oral hearing where witnesses can be called and cross-examined to determine the truth of certain allegations made against the officer concerned.

[68] This court in *Chai Kok Choi (supra)* had *inter alia* stated that an oral hearing might have been necessary if the officer concerned had not admitted committing the offence he was charged with; but if the officer had admitted the offence in reply to the show-cause letter, then oral hearing would no

longer be necessary. Cases may arise where, in the light of peculiar facts, an oral hearing is necessary and appropriate and the failure or refusal to afford such an oral hearing may result in the officer being prejudiced and the decision arrived at being declared a nullity or quashed. (see also: *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors.* [1995] 1 CLJ 619; [1995] 1 MLJ 308 (CA)).

[69] Zulkefli FCJ (now PCA) in *Yusof Sudin (supra)* was of the view that the principle in *Utra Badi (supra)* that the refusal to afford an officer an oral hearing in a disciplinary proceedings was not contrary to law, was a general principle and restricted to its own facts. His Lordship said:

> It is my view that the principle in *Utra Badi*'s case is a general principle and restricted to its own facts. It does not cover situation where the officer in his representation letter gives an exculpatory statement and make a special request for an oral hearing under the said General Orders 1980. In such a situation this court is in a position to review and extend the general principle in the case of *Utra Badi* by stating the exception to this general rule.

[70] In that case (*Yusof Sudin*), the majority decision held that "when there was a request by the public officer for an oral hearing after he had denied all the charges against him by furnishing credible evidence in his representation letter, then by virtue of GO 26(5) of the General Order 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution which states that a reasonable opportunity of being heard be given before any member of such a service was dismissed or reduced in rank."

[71] In short, "a reasonable opportunity of being heard" or "a right to be heard" as required under art. 135(2) of the Federal Constitution may include an oral hearing, particularly when the officer concerned had requested for it after he had denied all the charges and he seemed to have exculpated himself of the charges against him.

[72] In allowing the appeal by the officer concerned in *Yusof Sudin (supra)*, Zulkefli FCJ had distinguished the factual circumstances and the issues for determination in *Ultra Badi (supra)* with that case, *inter alia*, as follows:

(a) in *Utra Badi*, the issue for determination was not a request by the public officer to be given a right of an oral hearing in the disciplinary proceedings itself but a request to be given the right of an oral hearing for mitigation only before punishment was meted out;

(b) in *Utra Badi*, there was no specific request made by the public officer for an oral enquiry;

(c) *Utra Badi*'s case dealt with a general principle that was restricted to its own facts; it did not cover a situation where the officer in his representation letter had given an exculpatory statement and also made a special request for an oral hearing in the proceedings; in such a situation, this court is in a position to review and extend the general principle in *Utra Badi* by stating the exception to this general rule;

(d) the court should distinguish *Utra Badi*'s case which stated that the right to be heard given by art. 135(2) of the Federal Constitution did not require the person concerned to be given an oral hearing, by recognising the fact that there were exceptions to this general rule;

(e) if such exceptions were not recognised by the courts then the principle in *Utra Badi* might lead to the disciplinary authority exercising its discretion arbitrarily by simply refusing to call for an enquiry or oral hearing for further clarification although the officer concerned may have furnished sufficient evidence to exculpate himself;

(f) it was found that the charges framed against the officer (in that case) were general in nature and lacking in particulars; and

(g) after considering the serious charges levelled against the officer in that case it was then found that the disciplinary proceedings taken against him were null and void and that in all fairness he ought to have been given an oral hearing as he had requested so as to enable him to make an effective and meaningful defence to the charges.

[73] The issue of request for an oral hearing had been restressed by this court in a more recent case of *Tay Chai Huat (supra)* where Arifin Zakaria CJ, made the following observation:

> [1] … I agree that the appeal should be allowed on the premise that there was no request from the respondent for the appointment of Committee of Inquiry under Order 26(5) of the General Orders 1980. As such, the disciplinary board should not be faulted for failing to do so. I would, therefore, allow this appeal on that narrow ground.
>
> [2] I should also add that the facts in the present case can be distinguished from that of *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 1 CLJ 773. In that case, there was a request made by the appellant to the disciplinary authority to cross-examine the persons named in the charges proffered against him and for certain documentary evidence to be made available to him, which was denied. Similarly, in the case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448. In that case, the appellant explicitly requested for an oral hearing for the reasons stated in his letter. In both these cases, it was held that in

the circumstances of the case, an oral hearing ought to have been granted. The above authorities affirmed that if the right to be heard under art 135(2) is to have a real meaning, the circumstances in each case must be fully considered before the court could come to the conclusion whether or not such right has been properly observed by the disciplinary authority (see also: *B Surinder Singh Kanda v. The Government of the Federation of Malay* [1962] MLJ 169).

[3] In the present case, the respondent did not at any stage request for an oral hearing or for any document to be furnished to him. Therefore, he could not complain that such right was not afforded to him. It is for him to request for an oral hearing or for any document that he thinks could help him to prepare his answer to the charges levelled against him. In *Mat Ghaffar Baba* and *Yusof Sudin (supra)*, a request for oral hearing was made by the officers concerned, but was denied. The courts held that such refusal was unreasonable in the circumstances of the case and the courts went on to hold that the officers, in the circumstances, had not been afforded the right of hearing in its proper sense. On this ground, the decisions of the disciplinary authority were quashed.

[74] In the above passages in *Tay Chai Huat (supra)*, this court had in effect, recognised the principle that an oral hearing need to be afforded and related documents need to be supplied to the officer facing disciplinary proceedings if the officer concerned had requested for it from the disciplinary authority. However, in that case, judgment was not in the officer's favour because the court found that he had not at any stage of the proceedings requested for an oral hearing or for any document to be furnished to him.

[75] Another case to be considered is the Court of Appeal's decision in *Ghaffar Baba (supra)* where the Court of Appeal had the occasion to deal with a claim made by an officer in the police force that he was denied the right for an oral hearing at the disciplinary proceedings despite the fact that he had expressly requested for it. The Court of Appeal allowed his appeal. Arifin Zakaria JCA (later CJ) in delivering judgment of the court, ruled as follows:

In the circumstances, after considering the charges levelled against the plaintiff, the court was of the view that in all fairness the plaintiff ought to have been given an oral hearing as requested by him. Similarly documentary and other evidence purportedly relied upon by the first defendant in arriving at his finding ought to have been made available to him to enable the plaintiff to make an effective and meaningful defense to the charges. In the circumstances the court held that there had been a clear breach of the rules of natural justice as embodied in art 135(2) of the Federal Constitution which rendered the disciplinary proceedings null and void.

[76] That case was cited with approval by this court in *Tay Chai Huat (supra).*

[77] On the same issue, Gopal Sri Ram JCA, in the case of *Raja Abdul Malek Muzaffar Shah (supra)* said that "cases may arise where in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (see: *R v. Immigration Appeal Tribunal* [1977] 1 WLR 795).

[78] Another case which turned on a similar issue is the case of *Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 1 CLJ 493; [2002] 2 MLJ 131. In that case a police officer was dismissed from service by the disciplinary authority without giving him an opportunity for an oral hearing and also without supplying him with the usual reports and statements of witnesses. The Court of Appeal ruled that, having considered the charges and the representation made by the officer, the officer ought to have been afforded an oral hearing; and failure to do so constituted a breach of the procedural fairness and thus vitiating the proceedings before the disciplinary authority. The appeal in that case was allowed and the officer was reinstated in the police force.

[79] From the authorities referred to above, we are of the considered view that the law as currently adopted by the courts is more inclined in favour of affording a right to be heard orally to an officer facing disciplinary proceedings if there is a request made by him to the disciplinary authority. As correctly expressed by Richard Malanjum CJ (Sabah & Sarawak) in *Yusof Sudin*: "Accordingly I agree with my learned brother Zulkefli bin Ahmad Makinudin FCJ that 'when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of GO 26(5) of the General Order 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution …'. And like my learned brother I too allow this appeal and grant the relief as given by him."

[80] The situation might be different if the officer concerned despite having made specific request for an oral hearing or enquiry to be held had admitted the disciplinary offences against him as disclosed in the charges but gave the reasons or circumstances for their commission. This was what happened in *Gnanasekaran Krishnasamy v. Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [2012] 2 CLJ 985; [2011] 2 AMR 765, where this court dismissed the officer's appeal against his dismissal from the public service despite the fact that he had made specific request for an oral hearing but at the same time had admitted to the offences charged against him and had sought forgiveness and undertook not to repeat the offences in future.

[81] In the present case, the appellant had also complained that he was not given any document at all by the PSC notwithstanding that specific request was made for those relevant documents including the reports that were relied upon by the PSC in finding that a *prima facie* case had been proved against him. The PSC had admitted using the reports in deciding that a *prima facie* case was proved against the appellant. Learned counsel for the appellant submitted that the Court of Appeal was plainly wrong in saying that non-supply of the documents and reports did not deprive the appellant of his right to know the case against him.

[82] The right to documents related to the disciplinary proceedings is closely linked to the right for an oral hearing. Both are important elements in fulfilling the right to be heard to be afforded to the officer concerned. We are of the view that, in view of the serious charges levelled against the appellant which ultimately had resulted in him being dismissed from the service, in all fairness, the appellant ought to have been supplied with all the relevant documents and reports requested by him particularly since the disciplinary authority had relied on those documents to decide that a *prima facie* case had been proved against the appellant, to enable him to make an effective and meaningful defence to the charges. There is a plethora of authorities that deal with the issue.

[83] Lord Denning in the case of *B Surinder Singh Kanda (supra)* had ruled that "Their Lordships do not think it was correct to let him (referring to the adjudicating officer) have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice." His Lordship had also stressed that "whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

[84] It is an established law that the officer concerned must be supplied with those documents which were relied upon by the disciplinary authority in the proceedings against him where the officer had requested for the documents. It is the duty of the disciplinary authority to provide him with the documents. (See: *Tay Chai Huat (supra)*; *Chai Kok Choi (supra); and Raja Abdul Malek Muzaffar Shah (supra)*. No one facing a disciplinary proceedings can effectively meet the charges unless copies of the relevant statements and documents to be used against him are made available to him. Without copies of such documents, the officer concerned will not be able to prepare his defence effectively.

[85] The general principles on this issue can be summarised as follows:

(i) concomitant with the right to be heard is the right of a person to know the case made against him;

(ii) he must know what evidence has been given and what statements have been made affecting him; and

(iii) he must be given a fair opportunity to correct or contradict them.

[86] In the present case the appellant had made specific requests for documents and for an oral hearing to be afforded to him. In paras. 3, 4, 5 and 6 of his letter of representation the appellant stated:

> 3. Sehubungan dengan itu, bagi membuat representasi dengan sempurna dan jelas, maka saya ingin memohon laporan yang diterima oleh Pengerusi Suruhanjaya Perkhidmatan Awam yang menyatakan bahawa saya, Pegawai Siasatan Gred P44, Bahagian Pengurusan Sumber Manusia dan Pentadbiran Am, Suruhanjaya Pencegahan Rasuah Malaysia (SPRM), telah berkelakuan yang melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap saya. Tujuan saya memohon laporan tersebut adalah untuk mengetahui serta menjelaskan kepada YBhg Dato' dengan teliti dan jelas terhadap pertuduhan-pertuduhan yang dikenakan terhadap saya.
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> 4. Selain itu, saya juga ingin tahu daripada Suruhanjaya Perkhidmatan Awam Malaysia samada Suruhanjaya Pencegahan Rasuah Malaysia ada menjalankan suatu inkuiri sebelum laporan terhadap saya disediakan. Sekiranya terdapat laporan inkuiri, maka dengan berbesar hati sekiranya dapat memberitahu siapa yang mengambil bahagian dalam inkuiri tersebut supaya saya dapat memberikan penjelasan serta menafikan apa-apa tohmahan dibuat oleh orang yang mengambil bahagian inkuiri tersebut.
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> 5. Saya juga ingin memohon dan merayu kepada Suruhanjaya Perkhidmatan Awam Malaysia supaya diberi satu peluang pendengaran secara peribadi supaya saya dapat memberikan penjelasan yang jitu dan munasabah terhadap pertuduhan-pertuduhan yang dikenakan kepada saya. Justeru itu, saya juga ingin mendapatkan dokumen-dokumen yang diberikan bersama-sama dengan laporan yang dikemukakan kepada Suruhanjaya Perkhidmatan Awam Malaysia kepada saya bagi membolehkan saya memberikan penjelasan yang rapi dalam kes ini bagi membebaskan diri saya melalui representasi.
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> 6. Saya memohon kepada Dato' supaya memberikan dokumen serta laporan supaya saya dapat memberikan satu representasi yang sempurna bagi membebaskan diri saya. Walau bagaimanapun, saya terpaksa memberikan satu penjelasan bagi pertuduhan-pertuduhan.

[87] For every charge, the appellant gave explanation as to how the alleged offence happened and the opening sentence in his explanation he started with "Saya menafikan pertuduhan ini dengan alasan-alasan berikut". In his conclusion to his explanation on the charges, the appellant repeated his denial and concluded: "Saya menafikan pertuduhan yang dikenakan kepada saya." In short, the appellant expressly denied each and every charge made against him.

[88] The charges against the appellant were made based on a report received by the Chairman of the PSC. Paragraphs 1 and 2 of the show-cause letter state:

> Bahawa satu laporan telah diterima oleh Pengerusi Suruhanjaya Perkhidmatan Awam yang menyatakan bahawa tuan, Vijayarao a/l Sepermaniam (K/P: 780315-08-6073), Pegawai Siasatan Gred P44, Bahagian Pengurusan Sumber Manusia dan Pentadbiran Am, Suruhanjaya Pencegahan Rasuah Malaysia (SPRM), telah berkelakuan yang melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap tuan.
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> 2. Pengerusi Suruhanjaya Perkhidmatan Awam telah menimbangkan segala maklumat yang diterima berpendapat bahawa tuan patut dikenakan tindakan di bawah Peraturan 37, Peraturan-Peraturan Pegawai Pegawai Awam (Kelakuan dan Tatatertib) 1993 atas pertuduhan-pertuduhan berikut:

[89] The appellant requested for a copy of the said report to be given to him "untuk mengetahui serta menjelaskan kepada YBhg. Dato' dengan teliti dan jelas terhadap pertuduhan-pertuduhan yang dikenakan terhadap saya." Unfortunately his request was not entertained at all and was ignored by the PSC. It is incorrect and unacceptable in law to let the PSC have and rely on those documents or reports without the appellant being given their copies of those documents and reports to prepare for his defence to the charges.

Conclusion

[90] For the reasons stated above, we answer question 1 in the negative in that the appellant was not entitled to nor has any right to appeal to the Appeal Board against the decision of the PSC in dismissing him from the service. The Appeal Board has no jurisdiction or powers to deal with disciplinary proceedings involving an officer (such as the appellant) who was in the Managerial and Professional Group. If the appellant is aggrieved with the decision of the PSC in dismissing him, his avenue is to file the necessary application for judicial review at the High Court.

[91] With regard to question 2, our answer is that in the light of the facts and circumstances of this case, the appellant ought to have been given an oral hearing and related documents and reports as requested by him in his written representation, to enable him to make an effective and meaningful defense to the charges preferred against him. The appellant in this case was denied of his requests for an oral hearing as well as for the relevant documents and reports.

[92] In view of our answer to question 2 above and for the reasons stated above we allow the appeal with costs here and the courts below and set aside the orders of the courts below. Consequently, we make the following orders:

A (i) that the order of dismissal of the appellant made by the PSC is null and void and of no effect in law; and therefore is set aside;

(ii) that the appellant be reinstated as an Investigating Officer Grade P44 at the Malaysia Anti-Corruption Commission (MACC); and

B (iii) that the Registrar of the High Court at Pulau Pinang do conduct an assessment enquiry to ascertain salary, emolument, allowances and other benefits accrued and due to the appellant which should be received from the date of dismissal until full settlement.

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